No. 86-684

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, FLORIDA, HAWAII, INDIANA, KENTUCKY, MINNESOTA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, WASHINGTON, WISCONSIN, WYOMING

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INTEREST OF AMICI CURIAE

This case presents a significant issue respecting the Fourth Amendment's application. At issue is whether the California court's constitutional distinction between police and others, such as garbage collectors, who examine trash set out for collection, is to be adopted by this Court. That approach calls into question continued adherence to

Katz v. United States, 389 U.S. 347 (1967) since it eliminates the need to exhibit an actual expectation of privacy in order to assert the Fourth Amendment's protection.

The Amici States have a direct interest in the resolution of this issue in view of its broad implications for a wide variety of search and seizure cases.

In addition, adoption of the California court's limitation on trash examination could lead to confusion among officials as to the sorts of garbage protected and a loss of confidence by the public in the ability of local law enforcement officers to carry out their duties in an appropriate manner.

This brief is filed pursuant to Rule 36.4 of the Court.

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SUMMARY OF ARGUMENT

A person does not exhibit an actual expectation of privacy in trash placed on the street for collection and therefore subsequent examination of collected trash by police does not violate the Fourth Amendment.

Respondents placed their trash outside the curtilage for collection, manifesting an obvious intent to permanently disassociate themselves from it and a desire that others take it. Respondents lacked control over who could view their trash and failed to take obvious measures against its connection to them becoming known.

Distinctions between examination of trash by the garbage collector on one hand and trained police seeking evidence of crime on the other hand are inconsistent with this Court's precedent. Moreover, the rule followed by the lower court, which depends upon whether trash has lost

its "identity," violates the basic principle that the legality of challenged police actions does not turn upon their fruits.

It is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy. Trash placed for collection outside the curtilage, or removed from the curtilage by the authorized collector, passes into a sphere where access by others is uncontrolled and privacy expectations in castaway property evaporate.

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ARGUMENT

AN INDIVIDUAL'S TRASH COLLECTED BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM LATER GOVERNMENTAL EXAMINATION

A. No Subjective Privacy Expectation In Trash Is Exhibited When It Is Placed Outside The Curtilage Or Removed From The Curtilage By An Authorized Collector.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." The California Court of Appeal in this case affirmed the dismissal of an information charging respondents with narcotics trafficking because two search warrants were based on the contents of trash bags on the street in front of Greenwood's house which were collected by the garbage collector and segregated in the garbage truck for later examination by police lacking either a warrant or probable cause. People v. Greenwood, 182 Cal.App.3d 729, 227 Cal.Rptr. 539 (1986);

See C.T. 91, 101, 102, 301, 308-309. Thus, the question is squarely presented whether collected trash is protected from governmental examination under the Fourth Amendment.

A protected privacy interest under the Fourth amendment exists only if the individual complaining of police conduct exhibited an expectation of privacy which society recognizes as objectively reasonable. California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210, 215, 106 S.Ct. 1809, 1811 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984); Smith v. Maryland, 442 U.S. 735, 740 (1979). The challenged state activity here consisted of looking at trash left for collection on the street which was picked up by the authorized trash collector and deposited in a cleared portion of the garbage truck well. While it sometimes may not be clear whether an individual "manifested a subjective expectation of privacy from all

observations . . . , or whether instead he manifested merely a hope that no one would observe . . . " , California v. Ciraolo, 476 U.S. at ___, 90 L.Ed.2d at 216, 106 S.Ct. at 1812 (emphasis original), no such uncertainty appears when a person's trash placed for collection outside his home's curtilage is examined after its collection.

Few individuals harbor actual expectations concerning the security of their trash after it is collected. It undoubtedly is a matter of complete speculation to such persons whether items they deposited later will be noticed by others.

Individuals who do subjectively expect their deposited trash to remain unseen certainly do not exhibit such an expectation by placing it outside the curtilage in an area immediately accessible to outsiders for collection. Such individuals intend the trash

collector to take possession and convey the trash somewhere else for disposal, but no relationship of trust between the authorized collector and the homeowner ordinarily exists to regulate whether the former allows another to examine the trash. Indeed, collectors frequently may form contractual relationships which allow third parties to examine trash for reusable or contaminating items. Moreover, trash depositors all know that bags or bins at the street corner awaiting collection are practically useless as a way of preserving privacy since the trash is accessible there to scavengers, children and animals just as at a landfill following disposal. Thus, whatever subjective expectation people may harbor respecting whether collected trash will be maintained inviolate pending its complete destruction, the inability to exclude others once placed for collection outside the curtilage and the implicit

renouncement of any desire to retain those things is counter to any concept of manifesting desired privacy.

B. No Objectively Reasonable Privacy Expectation Existed.

Except in California, People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 68, 486 P2d 1262 (1971), remanded, 409 U.S. 33 (1972), on remand, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457, cert. denied, 412 U.S. 919 (1973), courts finding the Fourth Amendment violated with respect to trash have done so strictly in the context of an uninvited police entry into the curtilage without consent, or other justification. Fixel v. Wainwright, 492 F.2d 480, 483-484 (5th Cir. 1974) (fenced backyard of apartment building); Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957) (underneath home's porch); State v. Broom, 113 Ariz. 495, 557 P.2d 1052, 1054 (1976) (fifteen feet behind home in place not open to garbage

collector); State v. Chapman, 250 A.2d 203, 212 (Maine 1969) (inside garage under home); Everhart v. State, 274 Md. 459, 337 A.2d 100, 114-115 (1975) (apparent farmhouse yard; remanded for determination); Bolen v. State, 544 S.W.2d 918, 920 (Tenn. Crim. 1976) (private area of home adjacent to private driveway); Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 355-358 (1973) (home's backyard).1/

Respondents clearly were not faced with such an univited intrusion upon the "sanctity of a man's home and the privacies of life." Oliver v. United States, 466 U.S. at 180. It is self-

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1. Even if the trash was placed for collection within the private areas of the home, at most the collector in the normal course of entering the area acts in our view as an undercover agent, and an entry by an undercover agent is not illegal if he entered "for the very purposes contemplated by the occupant." Lewis v. United States, 385 U.S. 206, 211 (1966); See Hoffa v. United States, 385 U.S. 293, 302 (1966). In that case as well the homeowner simply has put misplaced confidence in the collector.

evident that the trash placed on the street in front of Greenwood's residence was not within the curtilage of his home. See United States v. Dunn, 480 U.S. ___, ___, 94 L.Ed.2d 326, 334-335, 107 S.Ct. 1134, 1139-1140 (1987).

Nor were police improperly pursuing their investigation by taking note of what was there. "[T]he Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'" Id., at ___, 94 L.Ed.2d at 236, 107 S.Ct. at 1141, quoting California v. Ciraolo, 476 U.S. at ___, 90 L.Ed.2d at 216, 106 S.Ct. at 1812.

Once respondents' trash was deposited on the street certainly by the time it was collected by the authorized collector--they had lost any control whatsoever over the trash. Consequently, respondents assumed the risk it might be conveyed to police. "This Court consistently has held

that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. at 743-744.

That principle works no harsh result in this case. Once "trash is discarded the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine." United States v. Terry, 702 F.2d 299, 309 (2d Cir.), cert. denied, 461 U.S. 931 (1983). "There is nothing unfair about requiring that people not discard things they want to keep secret, or destroy them before they do." United States v. Kramer, 711 F.2d 789, 792 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

Respondents may argue, however, that Krivda correctly differentiates between risks assumed by a trash depositor as between collectors and police. People v. Krivda, 5 Cal.3d at 366-367, 96 Cal.Rptr. at 68, 486 P.2d at 1268. This distinction, however, is traceable to a misreading of Katz v. United States, 389 U.S. 347 (1967) which indicated quite the opposite. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id., at 351 (emphasis added.).

This kind of distinction between police and third persons, was repudiated in California v. Ciraolo 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. 1809, where the Court was confronted with the argument that police aerial observation of a fenced backyard was a search because the police flight was specifically focused on a particular yard to identify marijuana.

The Court rejected this contention stating:

> "The observations by Officers Shutz and Rodriquez in this case took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they were able to observe plants readily discernable to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."

476 U.S. at ___, 90 L.Ed.2d at 217, 10 S.Ct. at 1813 (fn. omitted.). While the Fourth Amendment encompasses state and not private action, it does not follow that "annoying" behavior of private parties becomes unconstitutional when conducted by police.

Respondents' claim lacks roots in "concepts of real or personal property law or understandings that are recognized and permitted by society." Rakas v. Illinois 439 U.S. 128, 143-144, n. 12 (1978). Respondents may well have been concerned that the contents of the trash not fall into the hands of police but this does not of course establish a legitimate expectation of privacy in collected trash.

Respondents may claim that the local ordinances prohibiting unlicensed persons from rummaging through trash give rise to such expectations. Compare People v. Krivda, 5 Cal.3d at 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268. It is highly doubtful, however, that such ordinances ever restrict garbage collectors from cooperating with police, or, conversely, forbid police from enlisting the aid of the collector in a criminal investigation. Such laws normally address rummaging in owners' garbage cans, not the collector's

garbage truck or anywhere else. Moreover, such ordinances are meant to ensure sanitation and economic protection of the trash collector rather than privacy of the homeowner's trash. See United States v. Vahalik, 606 F.2d 99, 100-101 (5th Cir. 1979), cert. denied 444 U.S. 1081 (1980); People v. Krivda, 5 Cal.3d at 368, n. 1, 96 Cal.Rptr. at 69, 486 P.2d at 1269 (Wright, C.J., concuring and dissenting.); See also Magda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (trash ordinance a matter of local not constitutional law); United States v. Dzialak, 441 F.2d 212, 213 (2d Cir.) (trash ordinance does not affect abandonment), cert. denied, 412 U.S. 919 (1973). Nor is there any indication in this case that respondents relied on such ordinances.

Respondent Greenwood's opposition to the petition for certiorari contains the startling argument that the California Supreme Court's reliance upon articles I,

section 19 (now section 13) of the California Constitution in People v. Krivda, 8 Cal.3d 623, 624, 105 Cal.Rptr. 521, 504 P.2d 457 (1973) reflects the legitimacy of Greenwood's expectation of privacy in his trash. Such an analytical approach of course would leave nothing left of this Court's control over Fourth Amendment protections. In effect, state supreme courts would decide.

In any event, California law is hardly the vehicle on which to hurdle into constitutional obsolesence. As Greenwood recognizes, California courts no longer can suppress evidence in a criminal proceeding for violating the state constitutional search provision. Cal. Const., art. I, § 28, subd.(d). Since agreement with Greenwood's analysis would result in suppressing evidence, he impliedly asks this Court to assume that California favors as its "state law" a right fashioned by the state supreme court

in Krivda over the remedy the people more recently denied him in their state constitution. Of course, there is no way to know if this is the "state law" unless a choice was forced on the people, i.e., the evidence was suppressed. Thus, Greenwood's argument presents a situation where reliance upon a lower court's decision (Krivda) to prove a legitimate expectation of privacy is more than "merely tautological." Rakas v. Illinois, 439 U.S. at 144, n. 12. It is a tautology based on a conjecture.

The claimed reasonable expectation of privacy in trash found by Krivda ceases when garbage loses its "identity by being mixed and combined" with other trash, People v. Krivda, 5 Cal.3d at 367, 96 Cal.Rptr. at 68, 486 P.2d at 1268. Under this theory, garbage does not enjoy permanent Fourth Amendment protection; instead, refuse remains private only until its commingling makes the task of

gathering evidence difficult and unpleasant for the police. Whether or not one's trash will lose its identity and evidentiary utility before commingling cannot be reliably predicted at the time it is discarded. It is not a reasonable expectation of privacy that depends as much upon chance as upon the Constitution.

To avoid this conceptual embarrassment, proponents of the commingling theory urge that if the police feel that the cake is worth the candle, the legality of their subsequent sifting turns on whether the item discovered has evidentiary value, i.e., identity. If it does, they argue, the police have "searched" because the trash was not sufficiently commingled; if nothing of evidentiary significance is found because the trash was adequately commingled, the police may have looked long and hard but they have not "searched." This theory thus resurrects the rejected notion that

the legitimacy of government's action should depend on what turns up. See United States v. Jacobsen, 466 U.S. 109, 144 and n.9 (1984) (cases cited).

Sifting a garbage can is undoubtedly an unpleasant task. Its unwholesomeness is its own self-regulating limitation as a technique of police surveillance. By the same token, it is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy.

This limitation arises not so much from the need to protect garbage as the need to protect people in the home and curtilage from police entry. When trash is placed outside the curtilage for collection, or is removed by the authorized collector from within the curtilage, it passes into a categorically different and far more public sphere where

access by others is uncontrolled and any privacy expectations in castaway property evaporate. Since respondent placed his garbage outside the curtilage for collection, any expectation of privacy was not protected by the Fourth Amendment.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the California Court of Appeal should be reversed.

DATED: August 10, 1987.

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